No. 2415

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

U. S. OIL & LAND COMPANY, a corporation,

Appellant,

vs.

TERESA BELL, as Administratrix of the Estate of Thomas Bell, deceased, with the will annexed, et al.,

Appellees.

Brief for Appellees W. P. Hammon and F. C. Van Deinse.

CHARLES W. SLACK and
CHAUNCEY S. GOODRICH,
Solicitors for said Appellees.

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BRIEF FOR APPELLEES W. P. HAMMON AND F. C. VAN DEINSE.

The appeal is from a decree dismissing the bill (Tr., p. 296). The decree itself was one made after a hearing, had under New Equity Rule 29, upon a defense theretofore "presentable by plea in bar," namely, the defense of several existing judgments of

the courts of the State of California (Tr., p. 291). This defense the District Court held to be a complete bar to the bill (Tr., pp. 295-6), and so decreed (Tr., p. 297).

The appellant urges the following points:

1. That the decree as made and recorded incorrectly sets forth the stipulation of the parties on which the hearing was had (Tr., p. 341; Brief, pp. 3, 28).

2. That the State courts had no jurisdiction to render the judgments relied on by the appellees, and that these judgments were therefore void and wholly ineffective as a bar to the bill.

3. That even admitting the efficacy of those judgments, the bill was not barred thereby and therefore ought to have been heard on the merits.

We shall take up and discuss these points in order, and further will urge on our own account

4. That the decree properly dismissed the bill, because the latter failed to set forth facts justifying its retention in Equity.

I.

THE RECITAL IN THE DECREE OF THE STIPULATION ON WHICH THE HEARING WAS HAD.

The decree recites (Tr., p. 296) that at the hearing it was

> "admitted and stipulated by the complainant *that each and all of the judgments, orders and decrees* of the Supreme Court of the State of California, of the Superior Court of the State of California, in and for the County of Santa Barbara, and of the Superior Court of the State of California, in and for the City and County of San Francisco, *were rendered, made and entered and all the proceedings taken and acts done thereunder, were taken and done substantially as set forth and described in each the said several answers* and particularly in the first defense set out and made in the said joint and several answer of the defendants W. P. Hammon and F. C. van Deinse." (Italics ours.)

Succeeding a lapse of four months, both after the entry of the decree (Tr., p. 298) and after such entry had been called to the attention of the appellant (Tr., p. 317), the latter formally moved for a modification of the decree to read in this respect that at the hearing it was (Tr., p. 299)

> "admitted and stipulated by the complainant and defendants above named, that *the papers purporting to be copies of judgments, orders and decrees alleged or claimed to have been rendered and entered* in the Supreme Court of the State of California, the Superior Court of the State of Califor-

> nia in and for the County of Santa Barbara, and the Superior Court of the State of California in and for the City and County of San Francisco, *are substantially correct copies thereof.*" (Italics ours.)

Whatever might have been the importance or the effect of the modification sought, the motion for its allowance was certainly groundless. The facts relating to the hearing, and the stipulations of counsel preceding it, are set forth in full in the affidavits of counsel for the appellees (Tr., pp. 304-320) used at the hearing of the motion for a modification. The Court, in its opinion antedating the decree, in speaking of the judgments recites that (Tr., p. 291)

> "it has been agreed between the parties that such defenses may be separately heard and disposed of before the trial of the principal case, under Equity Rule 29."

This opinion also speaks (Tr., p. 296) of

> "the admitted judgments set forth in the answers."

The entire earlier record of the case shows that the defense actually considered was one of existing and admitted judgments, orders and decrees, and not one impotently based upon

> "copies of judgments, orders and decrees alleged or claimed to have been rendered and entered."

At the outset of the present litigation, in ruling

upon the demurrers of the appellees, the same Court said (Tr., p. 175):

> "If I felt at liberty to take judicial notice of the numerous orders and decisions that may have been entered in the courts of California in the course of the protracted litigation referred to in the bill, I would perhaps feel constrained to hold that there is no equity in the bill and that the demurrer should be sustained. But I am satisfied I am not authorized to take judicial notice of judgments entered in the courts of this State. Doubtless this Court will take judicial notice of the general rules of law declared by the Supreme Court of California in written opinions, but it will not take such notice of the judgment in any particular case unless properly pleaded and proved."

The same judgments, orders and decrees were pleaded in bar by these appellees, under the former rules (Tr., pp. 181-213). A replication to the answer supporting the plea was filed by the appellant (Tr., p. 223). The minute orders of the Court tell the story of what followed. The motion on the plea was argued (Tr., p. 226) and was denied, the Court preferring to hear the special defense upon answer since, by that time, the new rules abolishing pleas had gone into effect. The order of denial, however, provided that after the filing of the answer the cause should on a date certain (Tr., pp. 226-227)

> "be heard separately on the question of certain judgments in the State courts."

On the day set the cause came on (Tr., p. 289)

> "to be heard separately on the special defense, viz., previous judgments, etc., as set up by the bill and answer,"

and was then continued only because none of appellant's counsel appeared at the hearing. At the continued hearing "said special defense" was argued by counsel for both sides and submitted on briefs (Tr., pp. 290-291).

The two briefs of appellant's counsel, filed upon this submission, clearly show that the actual existence of the judgments in question, and their terms as pleaded, were admitted by the appellant and only their validity and effect questioned by it. These briefs are properly before this Court, and subject to its examination, if the correctness of the recital made in the decree of counsel's stipulation is to be questioned here.

National Foundry, etc., v. *Oconto, etc., Co.,* 183 U. S., 216, 234;
McIntosh v. *Pittsburg,* 112 Fed., 705, 706-707;
U. S. v. *Norfolk, etc., Co.,* 114 id., 682, 685-686;
Russell v. *Russell,* 129 id., 434, 438-439.

When the motion to modify the decree came to be heard it was denied (Tr., p. 324), save that, in order to meet the far-fetched suggestion of appellant's coun-

sel that the stipulation as recited bound them to an admission of the validity of the pleaded judgments, there was inserted in the decree (Tr., p. 323) the words

> "But the complaint did not stipulate or admit that such judgments or decrees were valid or binding, or that the said several courts had jurisdiction to render or enter the same."

The trial Court's recital as to what were the terms of a stipulation formally entered into in its presence can hardly be questioned here, especially since it repeated that recital by its denial of the motion to modify the decree. But in any event its statement is supported by the entire record. Had not the stipulation, as recited, been entered into, there would have been but slight cause to hold the repeated hearings which were had upon the special defense of *res adjudicata.* It is hardly to be presumed that Court and counsel would have repeatedly convened and considered questions whose determination, under the circumstances claimed by counsel for appellant to have existed, would have been a vain act.

In view of the character of the question raised in this present instance by the appellant, and of its patent inconsequence in the face of the record and of the District Court's earlier answer to it, we shall not give it undue importance by a continued discussion. If we have already treated it with a consideration it did not merit, it is because the question is raised by ap-

pellant's specifications of error (Tr., pp. 340-1), and is particularly stressed in its brief (Brief, pp. 3, 28).

II.

THE JUDGMENTS BY THE STATE COURTS IN BELL V. STAACKE WHICH THE APPELLANT URGES ARE VOID FOR LACK OF JURISDICTION.

The statement of facts in the brief for appellant follows in the main the allegations of the bill. It therefore does not include a definite, or in fact any, statement of the special defenses relied on by these appellees and found to be sufficient by the District Court. Only inferentially is information to be obtained from it regarding the judgments which make the subject matter of the bill *res adjudicata*. Consequently we are reluctantly compelled ourselves to make a succinct presentation of the facts.

The Preliminary Facts.

The controversy was between the respective successors in interest of John S. Bell, on the one hand, and of Thomas Bell, on the other, and is concerned with the title to a tract of 10,000 acres of land in Santa Barbara County, California. The appellant claims through the nephew, John S. Bell, the appellees through the uncle, Thomas Bell.

The relevant facts are simple. They appear from the pleadings, and the decrees there set out. In 1874 the uncle made a gift and conveyance to the nephew

of two certain tracts of land in Santa Barbara County, California, one of 10,000 acres, the other of 4,000 acres, in extent (Tr., p. 44). The uncle thereafter advanced large sums to the nephew and in 1885 took from him a reconveyance of the 4,000-acre tract in satisfaction of a portion, some $45,000, of the indebtedness so created (Tr., p. 45).

In 1887 uncle and nephew joined in a sale of the 4,000-acre tract and 10,000-acre tract (Tr., pp. 46, 232), the sellers mutually agreeing that the purchase money mortgages to the 10,000-acre tract should be held by the uncle to secure his debt from the nephew (Tr., pp. 49, 233). The purchaser (Grover-Rosener) defaulting in the payment of the purchase price (Tr., pp. 53, 234), the sellers in 1889 secured a retransfer of the property, title to both tracts being taken by George Staacke, a confidential employee of Thomas Bell (Tr., pp. 54, 234). The indebtedness of the nephew to the uncle had meanwhile increased and continued to increase until the latter's death late in 1892 (Tr., pp. 51, 237). Early in 1892 George Staacke executed a deed of trust of both tracts, aggregating 14,000 acres, to Campbell & Kent as trustees, to secure the repayment to San Francisco Savings Union of $60,000 in accordance with the terms of a certain promissory note executed by Staacke to the last named corporation (Tr., pp. 58, 239).

In 1893 John S. Bell commenced suit, in the Superior Court of Santa Barbara, against George

Staacke and the estate of Thomas Bell, praying for a decree that George Staacke held the title to the 10,000-acre tract upon a naked trust to reconvey to him, John S. Bell. This action is generally referred to as *Bell* v. *Staacke*. A decree was rendered in 1901, in conformity with the plaintiff's prayer, giving the estate of Thomas Bell judgment for over $50,000, but adjudging that this indebtedness was *not* secured by the 10,000-acre tract, which was thereupon ordered reconveyed free and clear to John S. Bell's grantees. This is the *decree of June 29, 1901,* set forth in the bill (Tr., pp. 12-34).

In 1898 John S. Bell's grantees commenced suit, in the same Superior Court, against Campbell & Kent, San Francisco Savings Union and the estate of Thomas Bell, praying for a decree that the deed of trust executed by George Staacke in 1892 was a violation of the trust upon which he held the 10,000-acre tract, was made without the knowledge of John S. Bell and was ineffective as a lien upon the said tract, and, further, that John S. Bell never received any benefit from the $60,000 loan which it was given to secure. The present appellant, U. S. Oil & Land Company, as successor in interest of John S. Bell, was a party to the action (Tr., p. 40). A decree was rendered in 1905 completely denying each and all of the plaintiffs' contentions, adjudging that the deed of trust was made with the knowledge and consent of John S. Bell and was effective as a lien on the 10,000-

acre tract, and, further, that the whole amount of $60,000 which it secured was obtained for the benefit of John S. Bell and had been applied in reduction of his indebtedness to his uncle. Further, it decreed that the estate of Thomas Bell was entitled to have the 10,000-acre tract sold before the 4,000-acre tract, upon the sale decreed to satisfy the claim of San Francisco Savings Union, then amounting to over $158,000. This action is known as *Bell* v. *San Francisco Savings Union,* or as the *San Francisco Savings Union case.* The decree therein is set out in the bill (Tr., pp. 39-81).

Appellant's Contentions.

The appellant sets up in its bill, first, the judgment of June 29, 1901, in *Bell* v. *Staacke,* alleging its conclusiveness and finality (Tr., pp. 17-21), second, the judgment in the *San Francisco Savings Union case* and its finality (Tr., p. 81), and the further facts that such judgment decreed a sale of the 10,000-acre tract and that such sale has never been carried out but, on the contrary, has been prevented by a conspiracy between the appellees (Tr., pp. 81-92). We shall, as before indicated, take up these contentions of appellant in order.

The Finality of the Decree of June 29, 1901, in Bell v. Staacke.

The answer of the appellees sets up, as a reply to

the decree in *Bell* v. *Staacke* pleaded in the bill, the fact that such decree was vacated by the Supreme Court of California, that a new trial was had and another decree made, that such decree was affirmed on appeal and thereafter executed, and that under acts performed under such decree the appellees are the owners of the 10,000-acre tract (Tr., pp. 228-255).

The appellant admits the existence of the subsequent decrees, judgments and orders in *Bell* v. *Staacke* pleaded by us. How then can it say that the decree of June 29, 1901, is final? Only by arguing, as it does, that the Supreme Court of California had no jurisdiction to vacate, and never effectually vacated, that decree, and that the Superior Court of Santa Barbara had therefore no jurisdiction to retry the case. Let us see how much validity there is in this argument, how ready a reception it should receive at this time and in this court.

The bill admits that the defendants in *Bell* v. *Staacke* appealed from the decree relied upon by appellant. But of such appeal it says (Tr., p. 18):

> "Thereafter such proceedings were duly had and taken on said appeal from said decree to the Supreme Court, so taken as aforesaid, that *said appeal from said judgment and decree was dismissed for want of jurisdiction by the said Supreme Court of the State of California, and the said judgment* and decree thereby became and *was affirmed;* that *said judgment* and decree ever since has been and remained and still *is in full force;* and that *said judgment* and decree was and *is a final adjudica-*

tion of the rights and interests of the parties to said action in which it was rendered and entered." (Italics ours.)

It then recites (Tr., p. 18) the filing of findings of fact and conclusions of law on March 6, 1901, and of additional findings and conclusions on June 7, 1901, and alleges that no notice of intention to move for a new trial was given

> "on or after the 7th day of June, 1901, and the time to serve and file any notice of intention to move for a new trial therein expired on or about the 17th day of June, 1901,"

and then proceeds (Tr., p. 18):

> "That the findings of fact and conclusions of law and *the decision* of said Superior Court in said action of *John S. Bell* v. *George Staacke, et al., on the 9th day of July, 1901, became and ever since have been final, conclusive and binding upon all the parties to said action,* and their successors in interest, and upon each and all of the heirs of said Thomas Bell, deceased, *and the jurisdiction and power of said Superior Court to hear or grant any motion for a new trial in said action was then terminated forever and ceased to exist, and the said Superior Court and any and all Appellate Courts* of the State of California, and the Supreme Court of the State of California *lost and ceased to have any jurisdiction whatsoever to entertain, hear, pass upon or review any notice of intention to move for a new trial or any motion for a new trial* in said action or any order made on any such notice or motion, *or to modify,* alter or change in any way or

manner or respect *said judgment of said Superior Court.*" (Italics ours.)

Then follows (Tr., pp. 19-21) a voluminous statement of the laws of California relating to new trials, and motions therefor, and to the effect to be given a dismissal by the State Supreme Court of an appeal. The dismissal by the Supreme Court of California of the appeal of the defendants from the decree of June 29, 1901, is recited at some length (Tr., p. 21), and the bill then continues (Tr., p. 21):

> *"That said order and judgment dismissing said appeal from said judgment has never been modified, vacated or set aside; that the said findings of fact and conclusions of law made, rendered and filed in and by said Superior Court as aforesaid on the 6th day of March, 1901, and on the 7th day of June, 1901, were and constituted the decision of said Superior Court in said action."* (Italics ours.)

The bill is ingeniously drawn. It skims lightly over the thin ice of truth, leaving behind, however, a track spelling the tell-tale words *"suppressio veri."* The first reading of its fluent phrases would leave any stranger to the controversy satisfied that the appellant not only had rights fully established by a decree of the trial Court in *Bell* v. *Staacke,* but that such decree had been established as a finality by a judgment of the Supreme Court of California. A second perusal *might* inspire the reader with a little suspicion of the good faith of the pleader, who be-

trayed so nervous an anxiety, to anticipate the possible defense of "new trial," as laboriously to discuss the law controlling new trials and to deny the jurisdiction of the Supreme Court to award one in *Bell* v. *Staacke.* The stranger, upon a third reading, would inevitably discover the nigger in the woodpile, in the presence of the plausible assertion that no notice of intention to move for a new trial was made

"on or after the 7th day of June, 1901,"

and in the absence of any allegation whatsoever that no notice of such intention was given *prior* to June 7, 1901, and *after March 6, 1901,* when the decision of the Court was filed.

What is the whole truth of the matter? The appellees' pleading answers the question by pointing to *six decrees in Bell* v. *Staacke subsequent to the decree of June 29, 1901* (Tr., pp. 228-255).

First.

Bell v. *Staacke,* 137 Cal., 307; 70 Pac., 171, September 16, 1902.

In the very same proceeding in which John S. Bell obtained a dismissal of the defendants' appeal from the decree of June 29, 1901, on the ground that it was prematurely taken, he sought to obtain a dismissal of the appeal from an order made by the trial Court denying the defendants' motion for a new trial, on the ground that the notice of intention to make such

motion had also been prematurely given. The judgment of the Supreme Court is as follows (137 Cal., 309; 70 Pac., 172):

> "The motion to dismiss the appeal taken from the judgment must be granted. *The motion to dismiss the appeal from the order refusing a new trial is denied.*" (Italics ours.)

The appellant in its bill relies on the first sentence of this judgment. Of the second it says nothing. On the contrary it endeavors, and somewhat successfully, to create the false impression that no motion for a new trial was ever made.

Second.

Bell v. *Staacke,* 141 Cal., 186; 74 Pac., 774, November 30, 1903.

The appeal from the order denying the defendants' motion for a new trial was heard in due course. The claim was renewed by John S. Bell that the notice of intention had been premature. The Court disposes of the argument summarily, saying (141 Cal., 189; 74 Pac., 774):

> "It is insisted, preliminarily, by counsel for respondent that the motion for a new trial was properly denied by the lower court, and that the appeal from such order should be affirmed by this Court because, he claims, the notice of intention to move for a new trial was prematurely given. There is nothing in this point."

The Court proceeds to consider the evidence at length, and by the concurrence of five justices, and without dissent,

> "the order denying the motion for a new trial is reversed, and the cause remanded" (141 Cal., 203; 74 Pac., 780).

Upon rehearing, on December 28, 1903, the judgment is amended so as to safeguard against a retrial of the issues covered by the findings in favor of the estate of Thomas Bell, establishing its claim for over $50,000 against John S. Bell, and

> "cause remanded for new trial of all other issues" (141 Cal., 204; 74 Pac., 380).

Third.

Bell v. *Staacke, Judgment on Retrial,* October 17, 1904.

The answer of these appellees sets out at length the decision (Tr., pp. 231-242) and the decree and order of sale (Tr., pp. 242-246) made by the Superior Court of Santa Barbara upon a retrial of the cause. These decide and adjudge that John S. Bell owes the estate of Thomas Bell a sum exceeding $95,000; that the defendant George Staacke (Tr., p. 236)

> "holds the legal title of the said land and premises in trust, first, as security for the payment of the sum aforesaid and the costs of the said defendants

to be taxed herein, and second, in trust for the use and benefit of the plaintiff John S. Bell,"

and appoint Jesse L. Hurlbut the commissioner of the Court to sell the 10,000-acre tract to satisfy the indebtedness (Tr., p. 243). The decree also orders a reconveyance of the 4,000-acre tract by George Staacke to the estate of Thomas Bell (Tr., pp. 242, 245).

Fourth.

Bell v. *Staacke,* 148 Cal., 404; 83 Pac., 245, January 2, 1906.

John S. Bell appealed from *the decree of October 17, 1904* (entered October 28, 1904). The last day for such appellant to file his transcript on appeal was August 3, 1905. It had not been filed August 16, 1905, and the appellee here, Teresa Bell, as administratrix, etc., on that day moved the Supreme Court for a dismissal of the appeal. The motion was granted, the full bench of seven Justices concurring in the order.

"The appeal from the judgment is dismissed" (148 Cal., 407; 83 Pac., 246).

Fifth.

Bell v. *Staacke,* 151 Cal., 544; 91 Pac., 322, July 22, 1907.

John S. Bell had also moved for a new trial of the action after *the judgment of October 17, 1904,* and

then had appealed from the order denying such motion. After considering such appeal and the evidence the Court says (151 Cal., 548; 91 Pac., 324):

> "The order denying plaintiff's motion for a new trial is affirmed."

On this appeal the appellant urged that *the judgment of June 29, 1901,* was necessarily made final by the Court's dismissal of the appeal therefrom as premature, even though a new trial were later granted by the Supreme Court upon an appeal from the order denying a motion for a new trial. To this contention of John S. Bell the Court answers briefly (151 Cal., 547; 91 Pac., 323):

> "A claim that the Superior Court had no jurisdiction to retry this case, notwithstanding that it was remanded by this Court for a new trial, is based on the fact that the appeal from the former judgment in favor of plaintiff was dismissed. This, it is said, constituted an affirmance of the judgment, preventing the subsequent giving of any other judgment. But a judgment, even although expressly affirmed on appeal, is vacated by an order granting a new trial. (See *Swett* v. *Gray,* 141 Cal., 83, 88; 74 Pac., 551.)

This disposes of the claim of the appellant here, advanced in its bill and in its brief on appeal, that the Supreme Court had no jurisdiction to order a new trial and the Superior Court none to retry the cause, and that the judgment of June 29, 1901, was therefore still subsisting unimpaired. In view of the appellant's

argument (Brief, pp. 29-32, 35-52) that the Supreme Court,—in holding that reversal of an order denying a motion for a new trial vacated a judgment even though an appeal from the latter had been dismissed,—altered a well-established rule of procedure in California, we call the attention of this Court to the language used in the case of

Swett v. *Gray,* 141 Cal., 83, 88; 74 Pac., 551, 552,

cited in the above quotation from the last decision on appeal in *Bell* v. *Staacke.*

In this case the judgment was *expressly affirmed* on appeal. Yet such judgment was held vacated, when the appeal from *the order* of the lower Court *granting,* in this case, *a new trial was affirmed,* the Supreme Court saying:

> "For reasons given in the foregoing opinion, *the judgment is affirmed, but this affirmance does not affect the order granting a new trial which has been affirmed, and which vacates the judgment.*" (Italics ours.)

Sixth.

Bell v. *Staache,* 159 Cal., 193; 115 Pac., 221, January 9, 1911.

The last attack upon *the judgment of October 17, 1904,* once disposed of, Jesse L. Hurlbut, the Commissioner under its terms, proceeded to sell the 10,000-

acre tract as decreed. Thereupon, as stated by the Supreme Court in its decision on the last appeal in *Bell* v. *Staacke* (159 Cal., 195; 115 Pac., 222):

> *"The land in controversy was* sold under the last judgment and *purchased by the administratrix,* Teresa Bell, the respondent herein. *In due course she received a commissioner's deed of conveyance.* John S. Bell and Kate M. Bell, his wife, having refused to deliver possession of the land in controversy after demand properly made, or to recognize in any way *the title so purchased* by the administratrix, the latter finally moved for a writ of assistance, and from the order of court directing its issuance this appeal is taken." (Italics ours.)

On this appeal John S. Bell again asserted the vitality of the stale judgment of 1901, and the lack of jurisdiction in the Supreme Court to vacate it. The Court says (159 Cal., 195; 115 Pac., 222):

> "The principal contention of the defense upon this appeal is that the judgment of the Superior Court of Santa Barbara County made and given upon the first trial in July, 1901, was and is a final and conclusive determination of the rights of all the parties hereto. This is based upon the argument that because of the failure to serve Louis Jones with notice of appeal from the order refusing their motion for a new trial, this Court was without jurisdiction to entertain the appeal and to render the judgment which, in fact, it did render in 141 Cal., 203; 74 Pac., 774."

The contention is treated with slight respect by the

Court, whose judgment is (159 Cal., 197; 115 Pac., 223):

"The order appealed from is therefore affirmed."

Bell v. Staacke. The deed of July 8, 1901, by George Staacke to the Grantees of John S. Bell.

In connection with *the decree of June 29, 1901,* the bill (Tr., p. 35) alleges the execution by George Staacke, on July 8, 1901, and his delivery to C. A. Hunt,

"as County Clerk of said County of Santa Barbara, and as Clerk of said Superior Court,"

of a deed of the 10,000-acre tract to John S. Bell's grantees. Such execution and delivery is alleged (Tr., p. 35) to have been made

"under and in accordance with said judgment and decree and the order therein made and contained,"

and the delivery to the Clerk was (Tr., p. 36)

"for and for the benefit of"

such grantees of John S. Bell. Further, it is alleged (Tr., p. 36) that this deed

"became and was an absolute grant deed, transfer and conveyance of the title and fee of, in and to said tract, piece and parcel of land of 10,067.2 acres, to said James L. Crittenden and Catherine M. Bell and vested in each of them an undivided one-half of said lands and of each and every part

> and portion thereof; and *that the said grant,* transfer and conveyance *became final on or about the 29th day of December, 1901.*" (Italics ours.)

Not much has been said by the appellant in its brief to indicate that any reliance is placed upon the effectiveness of the said deed to convey any title, though the Court's failure to hold that it was effective is stressed (Tr., p. 333; Brief, p. 24). It is sufficient for our purpose to point out that the bill declares such deed to have been made and delivered to the Clerk of Court *"under and in accordance with"* the short-lived judgment of June 29, 1901. Upon the vacation of that judgment therefore, on November 30, 1903, it ceased to have any validity, and the Clerk thereafter held the same for the defendants, and the ninth prayer of the bill (Tr., p. 96):

> "That it be adjudged and decreed that the Clerk of said Superior Court of Santa Barbara County deliver to the County Recorder of the said County of Santa Barbara the said deed of November 21st, 1901, made and executed by said George Staacke to Catherine M. Bell and James L. Crittenden, to be by said Recorder recorded in the records of the said County of Santa Barbara;"

asks not only a vain act, but an improper and unlawful one. If it were delivered by the Clerk of Court to the complainant the defendants could compel its surrender.

California Code of Civil Procedure, sec. 957.

Di Nola v. *Allison,* 143 Cal., 106, 114-115; 76 Pac., 976, 979;
Ward v. *Sherman,* 155 id., 287; 100 id., 844.

The deed was executed and delivered by the defendants to the Clerk of Court, as they were about to appeal from the decree of June 29, 1901, to procure a stay from that judgment (Answer, pages 38-39), under the provisions of Section 944 of the Code of Civil Procedure of the State of California:

> "If the judgment or order appealed from, direct the execution of a conveyance or other instrument, the execution of the judgment or order cannot be stayed by the appeal until the instrument is executed and deposited with the clerk with whom the judgment or order is entered, to abide the judgment of the Appellate Court."

The deed acted as a stay until the judgment appealed from was vacated, when it became a nullity.

Reynolds v. *Harris,* 14 Cal., 668;
Di Nola v. *Allison,* 143 id., 106, 109; 76 Pac., 976, 977.

Bell v. Staacke. Conclusion.

There is no claim in the bill, or in the appellant's arguments supporting it, relating to the case of *Bell* v. *Staacke,* which has not been repeatedly disposed of by the Supreme Court of this State. There is nothing in this cause but an attempt on the part of litigants

who have exhausted all their remedies in the State courts, and the patience of those courts as well, to renew the controversy in the Federal courts upon the flimsy pretext that the tribunals of local jurisdiction have misapplied or misconstrued a State statute of procedure. The District Court, after an examination of the *whole* history of *Bell* v. *Staacke,* not merely of such fragments of that history as the appellant had plausibly pleaded, in effect so held. We respectfully submit that its decision is unimpeachable. If ever a suitor had his day in court, the appellant and its predecessors in interest had theirs, in *Bell* v. *Staacke;* if ever rights were finally adjudicated by competent authority, they have been in that case,—in favor of these appellees, and against the appellant.

Nor is the appeal strengthened by the argument (Brief, pp. 30-32, 36-52) that the appellant was, in a sense, a *bona fide* purchaser for value of the land on September 18, 1902, and therefore as a citizen of Arizona must be protected against the change claimed by it to have been made, by the State Supreme Court in *Bell* v. *Staacke,* 137 Cal., 307; 70 Pac., 171, in the appellate procedure prevailing in the State courts. For in this case the Supreme Court of California, upon John S. Bell's motion to dismiss the appeal from the order refusing a new trial, on the ground that the motion for a new trial had been prematurely noticed, had said:

"The premature service of a notice of intention

to move for a new trial, or a failure to serve such notice at all, might be a good reason for denying the motion, but *does not deprive this court of jurisdiction to hear the appeal, nor does it constitute a reason for its dismissal upon the ground that the court has not jurisdiction to hear it."* (Italics ours.)

Bell v. *Staacke,* 137 Cal., 307, 308; 70 Pac., 171.

And it decreed (137 Cal., 309; 70 Pac., 172):

"The motion to dismiss the appeal from the order denying a new trial is denied."

This decision and decree was made September 16, 1902. In what respect, then, can the appellant, who bought his claim from John S. Bell on *September 18, 1902,* be better off than his predecessor in interest? Even if vested rights in rules of procedure can be acquired with a purchase of an interest in land, during the pendency on appeal of an action upon which the character and degree of the very interest purchased depend, surely such rights, when acquired at least two days after a change in such rules of procedure, must be, if dependent upon the rules existing before the change, of very slight merit indeed.

The appellant would have us believe (Brief, p. 52) that the alleged change in procedure of which it complains took place no earlier than 1903, when the appeal from the order refusing a new trial was allowed.

Bell v. *Staacke,* 141 Cal., 186; 74 Pac., 774.

The above quotations from the opinion on the earlier (1902) hearing in the Supreme Court prove the contrary to be true. The later opinion is useful to show, however, that no such change at any time occurred in the appellate practice as that claimed by the appellant to have taken place to its damage. For it distinguishes the case there presented from those then cited by John S. Bell and now cited by the appellant here as establishing the rule of procedure alleged to have been violated, saying:

> "It is insisted, preliminarily, by counsel for respondent that the motion for a new trial was properly denied by the lower court, and that the appeal from such order should be affirmed by this Court because, he claims, the notice of intention to move for a new trial was prematurely given. *There is nothing in this point. The findings and conclusions of law were filed March 6, 1901, in due time, and on March 19, 1901, defendants gave their notice of intention to move for a new trial. Some two months afterwards the judge of the lower court, on his own motion, and reciting that such findings had been inadvertently omitted, made and filed two additional findings upon two issues raised by the plaintiff's answer to defendants' cross-complaint. They were findings in favor of the defendant Theresa Bell, as administratrix,* that the indebtedness of plaintiff to Thomas Bell contained no illegal charges, and that no indebtedness in favor of plaintiff against Thomas Bell, or his estate, ever existed. *These were in no way connected with the findings upon which the decree in favor of plaintiff was founded, and neither party attacks them,*

nor has either party appealed from, or questioned, this part of the decree." (Italics ours.)

Bell v. *Staacke,* 141 Cal., 186, 189; 74 Pac., 774.

In any event, since the change, if any, in procedure, was made before, and not after, the appellant acquired its interest from John S. Bell, it becomes unnecessary to discuss the contention, mooted at length by the appellant, that such a change actually took place. For the argument certainly cannot apply to any modifications made by the State tribunals at least 48 hours prior to appellant's purchase.

The same reason makes superfluous any discussion of the applicability to the present case of the decisions of the Federal Courts refusing, the appellant claims, to grant recognition to certain opinions of State courts which upset a settled construction of State laws and thereby effect an impairment of the obligation of contracts. If the question attempted to be raised were at all germane it would be easy to dispose of it by a quotation from a recent decision of the Supreme Court of the United States:

"With this statement of the case we come to consider whether it presents any question under that clause of the Constitution which declares, 'No State shall . . . pass any . . . law impairing the obligation of contracts.' *This clause,* as its terms disclose, *is not directed against all impairment of contract obligations, but only against such as results from a subsequent exertion of the legislative power*

of the State. It does not reach mere errors committed by a State court when passing upon the validity or effect of a contract under the laws in existence when it was made. And so, while such errors may operate to impair the obligation of the contract, they do not give rise to a Federal question. But when the State court, either expressly or by necessary implication, gives effect to *a subsequent law* of the State whereby the obligation of the contract is alleged to be impaired, a Federal question is presented. In such a case it becomes our duty to take jurisdiction and to determine the existence and validity of the contract, what obligations arose from it, and whether they are impaired by the subsequent law. *But if there be no such law,* or if no effect be given to it by the State court, *we cannot take jurisdiction, no matter how earnestly it may be insisted that that court erred in its conclusion respecting the validity or effect of the contract; and this is true even where it is asserted, as it is here, that the judgment is not in accord with prior decisions on the faith of which the rights in question were acquired."* (Italics ours.)

Cross Lake Club v. *Louisiana,* 224 U. S., 632, 638.

III.

APPELLANT'S CLAIM THAT EVEN IF THE JUDGMENTS IN BELL V. STAACKE ARE NOT VOID, IT CAN ASSERT RIGHTS AGAINST THE APPELLEES. *Bell* v. *Savings Union,* 153 Cal., 64; 94 Pac., 225.

The appellant seeks to establish some right in itself through or under the judgment rendered in the *San Francisco Savings Union case.* Its theory, in making this attempt, is not very clear. Apparently, however, it relies on (A) the terms of that judgment itself, (B) the fact that it was rendered subsequently to the judgment on retrial of *Bell* v. *Staacke,* (C) the claim that title to the land being in trustees for San Francisco Savings Union there was nothing on which the judgment on retrial of *Bell* v. *Staacke* could operate, and (D) fraud in that the judgment in favor of San Francisco Savings Union was paid without sale of the 10,000-acre tract. We shall take up these propositions in order:

A. 1.

The Terms of the Judgment, with Respect to the Appellant Here.

The terms of the judgment itself can hardly give the appellant much satisfaction. The action in which it was given was commenced by the appellant's predecessors in interest for the purpose of having it de-

cleared that the deed of trust given in 1892 by George Staacke to Campbell & Kent, as trustees for San Francisco Savings Union, was void as against John S. Bell and his successors. Not only did the action fail of its purpose, but Mercantile Trust Company of San Francisco, the successor of Campbell & Kent, was by the decree directed to sell the 10,000-acre tract and out of the proceeds to pay over $158,000 to San Francisco Savings Union (Tr., pp. 74-81). The decree also adjudges (Tr., pp. 72, 74)

> *"that the above named plaintiffs* Kate M. Bell and James L. Crittenden *and the above named defendant* to cross-complaint *U. S. Oil & Land Company* jointly and severally *take nothing by this action."* (Italics ours.)

The appellant and its predecessors in interest were also required to pay costs (Tr., pp. 73, 81). They appealed. The judgment, however, was affirmed, with a reduction of some $17,000 in the claim of San Francisco Savings Union. At the same time the order denying the appellants' motion for a new trial was affirmed.

Upon such a decree the appellant endeavors to establish a right in itself! Although it is to "take nothing by this action," it seeks to find in the decree a vested right to the performance, in a certain specified manner, of an obligation in whose *benefits* it had no interest.

A. 2.

The Terms of the Judgment, with Respect to the Appellees Here.

The estate and heirs of Thomas Bell, deceased, were parties defendant in the *San Francisco Savings Union case.* Their interest in the action was threefold: (a) if the deed of trust was declared void as to the 10,000-acre tract of John S. Bell, they were interested in having it declared void as to the 4,000-acre tract of Thomas Bell; (b) in any event, they wished to assert a claim that, upon sale to satisfy the indebtedness to San Francisco Savings Union, the 10,000-acre tract should be sold first, the 4,000-acre tract sold only in the event the proceeds of the John S. Bell tract failed to satisfy the bank's claim; (c) they desired to protect their rights in course of litigation in the then pending action of *Bell* v. *Staacke.* We shall consider the terms of the judgment with respect to their several interests in order.

(a) The judgment decreed the deed of trust valid as to the 10,000-acre tract. It also upheld its validity as to the 4,000-acre tract. The administratrix of the estate of Thomas Bell, deceased, appealed from this feature of the judgment, but without success.

(b) The estate of Thomas Bell successfully asserted its right to have the John S. Bell tract (10,000 acres) sold before sale was made of its own parcel of 4,000 acres.

From its findings the trial Court concludes as follows (Tr., p. 73):

"That said defendant Teresa Bell as administratrix of the estate of Thomas Bell, deceased, with the will annexed, is entitled to *judgment herein that so much of said piece or parcel of land described in said grant in trust as does not include said second above-described of said two several tracts of land be first sold* by said defendant Mercantile Trust Company of San Francisco in the execution of said trusts *to the end that to the extent of the proceeds thereof the amount of said promissory note and interest may be paid out of said proceeds.*" (Italics ours.)

The judgment decrees (Tr., p. 79):

"That for the purpose of further executing said trusts *said defendant Mercantile Trust Company* of San Francisco *be and hereby is further ordered* and directed *to sell* at said time of sale mentioned in said notice or at the time to which said sale may have been postponed as the case may be, and pursuant to the terms of said notice of *the first above-described of said two several tracts of land and in case the highest amount bid therefor shall not be sufficient to pay the expenses of said sale* together with the reasonable expenses of said trusts including counsel fees of three thousand dollars and the just and full sum of one hundred and fifty-five thousand eight hundred and four 67-100 dollars with interest thereon from the date hereof, *then and in that case but not otherwise to sell at said time and place* and pursuant to said terms of said notice *the second above-described of said two several tracts of land.*" (Italics ours.)

(c) The judgment in terms recognizes the pendency of litigation between the successors of John S. Bell and those of Thomas Bell, and preserves the rights of the present appellees eventually secured to them in *Bell* v. *Staacke.*

The judgment on retrial of *Bell* v. *Staacke* was made October 17, 1904, filed October 26, 1904 (Tr., pp. 231, 242). The same Court, the same judge presiding, had then just tried the cause of *Bell* v. *San Francisco Savings Union,* and only a few months later, on March 14, 1905 (Tr., p. 81), was to give judgment in that cause. It was to be expected the trial Court would not jeopardize by one decree rights in litigation in the other pending case. As a matter of fact it carefully abstained from so doing.

In the case of *Bell* v. *Staacke,* one of the minor issues raised by the pleadings was the authority of George Staacke to execute the deed of trust whose validity was the main issue in the *San Francisco Savings Union case.* No attempt, however, was made by the Court in its second judgment in *Bell* v. *Staacke* to affect the deed of trust, although it did, as a matter of fact, find in that case (Tr., p. 239):

> "That the defendant George Staacke did not, in violation of any trust, or without the knowledge or consent of plaintiff, borrow of the San Francisco Savings Union $60,000, and did not in violation of any trust or trust deed convey said land in trust to secure the payment of said $60,000."

Similarly, the judgment in *Bell* v. *San Francisco Savings Union* left the matters at issue in *Bell* v. *Staacke* to be determined in that case, then in course of appeal from the judgment of October 17, 1904. The decision in this case, in order to ascertain the authority of George Staacke to execute the deed of trust, necessarily traveled at length over the ground of the relations between John S. Bell and Thomas Bell (Tr., pp. 44-65), and found them to be the same as those finally ascertained in *Bell* v. *Staacke*. But the decision also found, with respect to *Bell* v. *Staacke* (Tr., p. 71):

> "That said action . . . is still pending in this court . . . *and the relations between said John S. Bell* and his grantees of said first above-described of said two several tracts of land on the one hand *and said defendants George Staacke and Teresa Bell as administratrix* of the Estate of Thomas Bell, deceased, with the will annexed, on the other hand *in respect of said indebtedness of said John S. Bell to said Thomas Bell and in respect of said first above-described of said two several tracts* of land and all or any parts thereof *are involved in said action and constitute the subject matter thereof and are in course of judicial determination and settlement therein.*" (Italics ours.)

And the judgment provides that the balance of proceeds on sale, if any, after satisfaction of the bank's claim, shall be paid

> "to said defendant George Staacke, his heirs or assigns,"

which was the only decree proper or possible, since the trusts upon which George Staacke held the land, and would hold the balance of the proceeds, could be definitely ascertained only in *Bell* v. *Staacke.*

B.

The Argument that Judgment in the San Francisco Savings Union Case Was of Later Date than that in Bell v. Staacke.

We readily admit that judgment in *Bell* v. *Staacke* was given October 17, 1904, judgment in *Bell* v. *San Francisco Savings Union* on March 14, 1905. That the former is unaffected by the latter, in view of the recognition by the latter of the pending *Bell* v. *Staacke* litigation, would also seem to be too evident for argument.

The appellant, however, attempts to make the point that one judgment overlaps the other, and that the latter in point of date controls. But what of that? Granted the judgment in the *San Francisco Savings Union case* "controls," whatever that may mean, of what benefit is that to the appellant? Such judgment decrees, in set terms, that it

"take nothing by this action."

The decree destroys all the appellant's contentions, finally adjudges that George Staacke held the property on trusts favorable to Thomas Bell's rights and entirely different from those the appellant here asserted,

and places the latter where it has no rights save through

"George Staacke, his heirs or assigns."

And such rights, if any, the Court, by the very decision upon which the appellant relies, found to be dependent upon relations which

> *"in respect of said first above-described of said two several tracts of land and all or any parts thereof are involved in said action (Bell* v. *Staacke) and constitute the subject matter thereof* and are in course of judicial determination and settlement therein." (Italics ours.)

This, we urge, would alone be sufficient reply to the contentions of appellant. There are others, however. For instance we point out, in answer to the suggestion of the appellant that the decree in the *San Francisco Savings Union case* supplanted the decree in *Bell* v. *Staacke* as to the issues there tried for the reason that

> "If rights under former judgments are to be relied upon they must be pleaded in bar and given in evidence and in the absence of such practice the later judgment controls the former" (Brief, p. 60),

that the *decree* on retrial in *Bell* v. *Staacke* was dated *October 17, 1904,* filed October 26, 1904, whereas from a glance at the recitals of the decision in the *San Francisco Savings Union case* it appears that the latter case was *tried in March, June and September,*

1904, and that the giving of evidence had been completed on *September 23, 1904,* a month before the decree in *Bell* v. *Staacke* was made!

The suggestion is also repeatedly made by appellant (Brief, pp. 58-70) that Teresa Bell, as administratrix, waived any rights she might have under the final judgment in *Bell* v. *Staacke* by not pleading the pendency of that action in abatement in the *Savings Union case.* The answer to that suggestion is easy: There is nothing in the record to show that she did not so plead; the Court in the *Savings Union case* made findings respecting the pending action of *Bell* v. *Staacke* and expressly reserving the issues there under consideration, from which facts it may reasonably be presumed that the pendency of the Staacke suit had been properly pleaded. And, in any event, as the judge who presided over the trial of both actions made very clear, the distinction between the issues in the two cases made a conflict between the two decisions, or a "control" of one by the other, an utter impossibility.

We might further suggest, and we respectfully do, that if the validity or effect of the decree of October 17, 1904, in *Bell* v. *Staacke* had been subject to question, *1912* was neither the time nor was the *District Court* the place, nor was appellant the party, to question it. It is strange, to say the least, that relief was sought so late in a Federal court against a State judgment which had been the subject-matter of so much

litigation in the state courts. The reason is not far to seek. The state tribunals had already spoken. The appellant has sought, in a court unfamiliar with the former proceedings, relief which had been denied to it and its predecessors by other competent courts in a twenty-years' controversy. The relief desired by appellant should be sought, if at all, in an action against the Supreme Court of California, to quiet title against the clouds of two or three of its judgments!

The decree in *Bell* v. *Staacke* was affirmed by the Supreme Court of California July 22, 1907, over two years after the decree in *Bell* v. *San Francisco Savings Union* was made. No doubt was there, or has since, been cast on its validity. On the contrary, its validity has been upheld. We quote from the decision of the State Supreme Court its language further recognizing the propriety, validity and effect of the proceedings in *Bell* v. *Staacke,* spoken *after* the decree in the *San Francisco Savings Union case.*

On the appeal in the last named case the Court said (153 Cal., 74; 94 Pac., 229):

> "In the foregoing discussion we have said nothing as to the contention of the appellants Crittenden and U. S. Oil and Land Company that the Court erred in denying them any priority as against the estate of Thomas Bell. It is found, however, that *the action of Bell v. Staacke, the pendency of which was set up in the pleadings, was still pending at the time of the decision,* and that the question of the relations between John S. Bell and his grantees on the one hand, with Staacke

and the estate of Thomas Bell on the other, in respect of the indebtedness of John S. to Thomas Bell and of the ten-thousand-acre tract are involved in said action and 'are in course of judicial determination and settlement therein.' *The judgment, accordingly, made no adjudication of the rights of John S. Bell and Thomas Bell (or their successors) as between each other, leaving the question of those rights to be determined in Bell v. Staacke.* If it could be said that Staacke had no interest in this controversy as to priorities between John S. Bell and Thomas Bell, *the finding as to the pending action (which is not attacked) clearly made it the duty of the court to reserve for adjudication in that action the matters therein involved. (Casey* v. *Jordan,* 68 Cal., 246; 9 Pac., 92, 305.)" (Italics ours.)

In affirming the order granting the administratrix a writ of assistance to dispossess the complainant's predecessors, John S. Bell and Kate M. Bell, of the last portion of the 10,000-acre tract held by them, the Court says (159 Cal., 195; 115 Pac., 222):

"*The land in controversy was sold under the last judgment* and purchased by the administratrix, Teresa Bell, the respondent herein. In due course she received *a commissioner's deed of conveyance.* John S. and Kate M. Bell, his wife, having refused to deliver possession of the land in controversy after demand properly made, or to recognize in any way *the title so purchased by the administratrix,* the latter finally moved for a writ of assistance, and from the order of court directing its issuance this appeal is taken." (Italics ours.)

Distinct issues were settled by the two cases of *Bell*

v. *Staacke* and *Bell* v. *San Francisco Savings Union*. The *San Francisco Savings Union case* was solely concerned with the obligations of the successors of both John S. Bell and Thomas Bell to the bank, *Bell* v. *Staacke* with the obligations of those respective successors to one another. Both involved some consideration of the relations between John S. Bell and Thomas Bell. But *Bell* v. *Staacke* was the sole decision finally adjudicating those relations and the trusts upon which George Staacke held the title to the 10,000-acre tract. *Bell* v. *San Francisco Savings Union* was a branch case in which a third party, the San Francisco Savings Union, was interested in a determination of the restricted question whether the execution of a single instrument by George Staacke was or was not effective to create a specific lien on the trust property. Only to the incidental extent necessary to answer that question were the relations of the Bells and Staacke necessarily involved in the branch case. The cases paralleled each other in the course of their respective trials and appeals. They were necessarily interdependent in one sense, in another they were even more necessarily independent of each other. *Both cases were decided against the appellant and its predecessors.* Both decrees have been affirmed against appellant here. In express terms, they are declared consistent one with the other. The decree in the *San Francisco Savings Union case* recites, in effect, that it does not purport to trespass on

the other case. Under *Bell* v. *Staacke* a sale was made and, at the end of the period of redemption, a deed executed. The validity of the title thereby conferred has been recognized by the issuance of a writ of assistance and its confirmation on appeal. If litigation of matters already litigated is ever to be discouraged, it should be in this case.

C.

Appellant's Claim that, Title Being in the Trustees for San Francisco Savings Union, There Was Nothing Upon Which the Judgment in Bell v. Staacke Could Operate.

This argument is the last ingenious attempt to discredit the title of the appellees, secured through the judgment in *Bell* v. *Staacke.* It ignores, as does the whole brief of appellant, the well-established principle that *it is not sufficient to maintain a bill of this character, to attack the title of the defendants. The complainant,* to succeed, *must allege and prove a superior right and title in itself.*

Heney v. *Pesoli,* 109 Cal., 53; 41 Pac., 819;
McGrath v. *Wallace,* 116 id., 548, 551; 48 id., 719, 720;
White v. *McGilliard,* 140 id., 654; 74 id., 298;
Di Nola v. *Allison,* 143 id., 106, 115; 76 id., 976, 979;

Williams v. *San Pedro,* 153 id., 44, 49; 94 id., 234, 236;
House v. *Ponce,* 13 Cal. App., 279, 281; 109 id., 161.

As the Court says, in the case of *Williams* v. *San Pedro,* above cited, speaking of the plaintiff:

> "If he had no title, he cannot complain that someone else, also without title, asserts an interest in the land (citing cases)."

It was in obedience to this principle that the appellant in its bill pleaded at such length *the judgment of June 29, 1901,* in *Bell* v. *Staacke,* and with such insistence alleged its finality. Now, however, since the later and final judgments pleaded by the appellees stripped the false mask of verity from that short-lived decree, the appellant makes a right-about-face. It seeks to attack the validity and effect of the *real judgment* in *Bell* v. *Staacke,* although heretofore it relied upon the vacated judgment, in the same case, to establish the affirmative right in itself without which it cannot recover. The appellant's present position, that a vacated judgment is effective but a final and affirmed judgment is a nullity, properly reflects the merit of its claims. Its present attempt to escape from the result of the litigation in *Bell* v. *Staacke* can, however, be of but little avail to it, since the only right it asserts in itself is that alleged to be derived through the vacated judgment or through the convey-

ance executed to stay, during appeal, all execution upon such judgment.

In any event, this contention, like more than one contention of the appellant, presupposes a legal condition that does not exist. The appellant asserts (Brief, p. 56):

> "That Staacke had no interest in the 10,000-acre tract which could be made the subject of foreclosure and sale was definitely determined by the findings in all the actions referred to in the pleadings in the suit at bar, as well as by the Supreme Court of California in its decision on affirming the decision in *Bell, et al.,* v. *San Francisco Savings Union.*
>
> "Staacke, under the agreement between John and Thomas Bell, was merely a naked trustee of the legal title, but by and under the *record, title and conveyances* he was the absolute owner in fee with no outstanding right, title, interest or equity in any other person, and as such absolute owner in fee he deeded and conveyed all the title and interest that he had to the trustees of the San Francisco Savings Union, who as bona fide purchasers for value without notice took, received and held the absolute and whole title in fee free from every title, right or claim, legal or equitable, of John S. Bell and Thomas Bell. Nothing was then left in either John S. Bell or Thomas Bell, and nothing could have been left in Staacke as he never had anything but the naked legal title and all of the legal title passed out of and from him to the trustees of said San Francisco Savings Union." (Italics appellant's.)

Thus the appellant evidently seeks to throw open a door for the discussion in this court of the whole

body of mortgage and deed-of-trust law of California, a discussion which it was careful never to broach in the Supreme Court of the State on the appeals in *Bell* v. *Staacke*. The discussion is necessarily a futile one, and one not to be unnecessarily prolonged.

How true is it that, under California law, a deed of trust to secure an indebtedness passes the whole legal title to the trustees, the whole equitable title to the beneficiary, and leaves nothing in the trustor upon which a judgment against him can operate? We shall answer this question briefly but sufficiently for the purpose of discrediting the tardy and far-fetched theory of the appellant.

The legality in California of trust deeds to secure loans was at one time seriously questioned. When the validity was finally upheld, it was so on the ground that they had been tacitly recognized so long by the community that their existence and effectiveness had become a rule of property.

> *Sacramento Bank* v. *Alcorn,* 121 Cal., 379, 382; 53 Pac., 813;
> *Hodgkins* v. *Wright,* 127 id., 688, 692; 60 id., 431.

But the estate they created was immediately defined and limited. In the first of the two cases last cited (*Sacramento Bank* v. *Alcorn*) Justice Temple, speaking for six members of the Court, says of the trust deed (121 Cal., 383; 53 Pac., 814):

"Indeed, under the decisions, it is practically, though not in legal effect, little more than a mortgage with power to convey. *The legal title passes, but it conveys no right of possession* and the trustor may remain in possession, and, until the execution of the trust, may maintain an action to recover possession even when the trust deed is silent upon the subject of possession. (*Tyler* v. *Granger,* 48 Cal., 259.)

"Notwithstanding the deed of trust, *the trustor may file his declaration of homestead,* and hold the premises as such against his creditors who are not secured by the trust deed or some valid lien. (*King* v. *Gotz,* 70 Cal., 236.)

"Notwithstanding the trust, *the trustor may devise or transfer the property subject to the trust.* (Civ. Code, sec. 864.) And *the devisee, or grantee, acquires a legal estate* against all persons except the trustees and persons lawfully claiming under them. (Civ. Code, sec. 865.) And when the purpose of the trust ceases the estate of the trustees also ceases. (Civ. Code, sec. 871.) Under these decisions and statutes it would seem that, *while we must say that the title passes, none of the incidents of ownership attach,* except that the trustees are deemed to have such estate as will enable them to convey. *So limited, such a trust has all the characteristics of a power* in trust." (Italics ours.)

We call the Court's particular attention to the fact that the trustor can devise or transfer the property and that his devisee or grantee acquires, not only the right of possession, the right of declaring a homestead on the property, and other rights incident to ownership, but also

"a legal estate against all persons except the trustees."

This results from the provisions of

California Civil Code, sec. 864,

permitting the trustor to devise or transfer the trust properly, and of

California Civil Code, secs. 865 and 866,

reading as follows:

865. "The grantee or devisee of real property subject to a trust acquires a legal estate in the property, as against all persons except the trustees and those lawfully claiming under them."

866. "Where an express trust is created in relation to real property, every estate not embraced in the trust, and not otherwise disposed of, is left in the author of the trust or his successors."

The estate of the trustor in the trust property can be reached by his creditors.

"It is provided by sec. 688 *Code Civil Procedure,* that 'all goods, chattels, moneys, and other property, both real and personal, or any interest therein, of the judgment debtor, not exempt by law, . . . are liable to execution.' The deed of trust vested or left an interest in the property in question in Thomas O. Larkin, and such interest is, under the Code, subject to sale under execution."

Kennedy v. *Nunan,* 52 Cal., 326, 331.

The devisee of property subject to a trust may quiet title to the real property.

> *Fatjo* v. *Swasey,* 111 Cal., 628, 638; 44 Pac., 225.

The broad language of limitation used by the Court in the above mentioned case of *Sacramento Bank* v. *Alcorn* has not been restricted. Rather, it has been extended.

The case was followed in the memorandum decisions in

> *San Francisco Savings Union* v. *Ray,* 121 Cal., XVII.; 53 Pac., 1129, and
> *San Francisco Savings Union* v. *Lee,* 122 id., XVIII.; 54 id., 1130.

Instances showing its authority in more extended form follow, in chronological order:

1. The case was cited with approval upon the appeal in a decision bearing a title of familiar names, but reversed from their usual order,

> *Staacke* v. *Bell,* 125 Cal., 309, 315; 57 Pac., 1012.

2. In the opinion in

> *Hodgkins* v. *Wright,* 127 Cal., 688, 692; 60 Pac., 432,

it was cited as authority for the proposition that deeds of trust

> "in effect . . . are mortgages with power to sell."

3. In the case of

Herbert Craft Co. v. *Bryan,* 68 Pac., 1020, 1021,

the Court says:

> *"The passing of the legal title in such case is mostly ideal. It is deemed to have passed only for the purpose of enabling the trustee to convey a title. In all other respects the title remains in the trustor,* and is still the right by which he holds that which is his. This Court, in *Bank* v. *Alcorn,* felt constrained to hold such deeds valid as security. So far only was it necessary to go." (Italics ours.)

4. In the case of

Tyler v. *Currier,* 147 Cal., 31, 35; 81 Pac., 319, 321,

it is said:

> "While the deed of trust in one sense passed the title, yet it did so only for the purpose of security, and was, except as to the form and the procedure by which the loan could be enforced, substantially a mortgage."

5. The decision and language of *Sacramento Bank* v. *Alcorn* is approved in

Weber v. *McCleverty,* 149 Cal., 316, 321-322; 86 Pac., 706, 709,

where it is pointed out, however, that

> "the entire estate of the trustor, *for the purposes of the trust,* must during the intervening period be vested as an estate, and not as a lien, in the trustee, otherwise he could not legally convey it in execution of the trust." (Italics ours.)

That is, a mortgage creates only a lien in favor of the mortgagee, while a deed of trust creates an estate in the trustee. This distinction we grant, of course. But the estate in the trustee is a limited one, "for the purposes of the trust." *The rest of the estate remains in the trustor.*

6. In the case of

Curtin v. *Krohn,* 4 Cal. App., 131, 135; 87 Pac., 243, 245,

it is authority, with the case last above cited, for the statement

> "that trust deeds in the nature of a mortgage convey only a defeasible estate having none of the incidents of ownership except that the trustees are deemed to have such an estate as will enable them to convey. . . . They are in effect mortgages with power to sell."

The Court continues:

> "Hence, there was no reason in law or logic

> why the court could not act directly, without forcing the trustee to sell and convey the premises. Under the circumstances, the plaintiffs could maintain an action to have the accounts and respective rights of the parties adjusted and the property sold, and the court could order the sale to be made by its own commissioner. *More* v. *Calkins,* 85 Cal., 190; 24 Pac., 729."

The deed of trust, in other words, is so closely akin to a mortgage, that a sale of the property can be decreed and carried out by the Court and *title will pass without act of the trustees!* This decision of the District Court of Appeals was reviewed by the Supreme Court on a petition for a rehearing, and the petition denied.

7. The full Court of seven Justices concurred in the decision in

McLeod v. *Moran,* 153 Cal., 97; 94 Pac., 604.

In this case the only question was whether a duly selected "homestead" was abandoned,—under the provision of

California Civil Code, Sec. 1243:

> *"A homestead can be abandoned only by a* declaration of abandonment, or a *grant thereof"* (italics ours),—

by the execution of a deed of trust. In other words, was a deed of trust a *"grant"?*

The Court says (153 Cal., 99; 94 Pac., 605):

> "While a deed of trust given simply as a security for the payment of a debt is in a certain sense a 'grant,' it cannot be held to be a grant within the meaning of that word as used in Section 1243 of the California Code."

After discussing the decisions on deeds absolute on their face, but given as security, the Court proceeds:

> "These decisions are based upon the fact that such a deed, though in form a grant, is really only a mortgage, and does not convey the fee. A trust-deed of the kind here involved differs from such a deed only in that it conveys the legal title to the trustees so far as may be necessary to the execution of the trust. It carries none of the incidents of ownership of the property, other than the right to convey upon default on the part of the debtor in the payment of his debt. The nature of such an instrument has been extensively discussed by this court, and the sum and substance of such discussion is that while the legal title passes thereunder, and the trustees cannot be held to hold a mere 'lien' on the property, it is practically and substantially only a mortgage with power of sale. (See *Sacramento Bank* v. *Alcorn,* 121 Cal., 379, 383; 53 Pac., 813; *Tyler* v. *Currier,* 147 Cal., 31, 36; 81 Pac., 319; *Weber* v. *McCleverty,* 149 Cal., 316, 320; 86 Pac., 706.) *The legal title is conveyed solely for the purpose of security, leaving in the trustor or his successors a legal estate in the property, as against all persons except the trustees* and those lawfully claiming under them. (*Civ. Code,* Secs. 865, 866.) *Except as to the trustees* and those holding under them, *the trustor or his successor is treated by our law as the holder of the*

legal title. (*King* v. *Gotz,* 70 Cal., 236; 11 Pac., 656.) *The legal estate thus left in the trustor* or his successors entitles them to the possession of the property until their rights have been fully divested by a conveyance made by the trustees in the lawful execution of their trust, and entitles them to exercise all the ordinary incidents of ownership in regard to the property, subject always, of course, to the execution of the trust. *This estate is a sufficient basis for a valid claim of homestead.* It was expressly held in *King* v. *Gotz,* 70 Cal., 236; 11 Pac., 656, that the trustor may select as a homestead property covered by such a trust-deed. The estate of the trustees absolutely ceases upon the payment of the debt (*Civ. Code,* Sec. 871), leaving the whole title in the grantor in whom it was vested at the execution of the trust-deed, or his successors, and leaving nothing in the trustees except the bare legal title of record, which they can be compelled to reconvey to the owner simply to make the record title clear. (*Tyler* v. *Currier,* 147 Cal., 31, 36; 81 Pac., 319.) We think it is apparent that the 'grant' referred to in Section 1243 of the Civil Code does not include a deed given solely as security for the payment of money." (Italics ours.)

8. After the earthquake and disastrous fire in April, 1906, which destroyed the public records of San Francisco, an act was adopted by the State Legislature (Stats. 1906, page 78) under which the owner of real property could maintain an action against "all persons" to establish his title of record. Its benefits were open, however, only to persons in possession of real property who had

"an estate of inheritance, or for life"

therein. It was immediately urged that a deed of trust divested a trustor of any "estate of inheritance." The argument was quickly disposed of, the Supreme Court saying, in the case of

Warren Co. v. *All persons, etc.,* 153 Cal., 771, 773; 96 Pac., 807, 808:

"The contention of the appellants is that by the execution of the deed of trust the title in fee vested in the trustee, Mercantile Trust Company of San Francisco, and that so long as such title was held by the trustee, the plaintiff had no such estate or interest as would authorize it to maintain an action under the provisions of the act in question. . . . It is argued by appellants that inasmuch as, by the provisions of the Civil Code (Sec. 863) 'every express trust in real property, valid as such in its creation, vests the whole estate in the trustee, subject only to the execution of the trust' and the 'beneficiaries take no estate or interest in the property,' the execution of the deed of trust to the Mercantile Trust Company vested the whole estate in such trustee, and there remained in the grantor and his successors no 'estate or interest in the property,' and, necessarily, no 'estate of inheritance or for life.' . . . That such instruments do not create a mere lien or encumbrance, but vest in the trustee the legal title to the property, has been repeatedly held, and has been reasserted by this Court in the very recent case of *Weber* v. *McCleverty,* 149 Cal., 316; 86 Pac., 706.

"*It does not follow, however, that no estate can remain in the trustor.* Under section 864 of the Civil Code, the author of a trust may prescribe to whom the property shall belong, in the event of the failure or termination of the trust, and may

transfer or devise such property, subject to the execution of the trust. By the terms of section 865, *his grantee or devisee acquires a legal estate* in the property, as against all persons except the trustees and those claiming under them. Section 866 provides that every estate not embraced in the trust, and not otherwise disposed of, is left in the author of the trust or his successors. While, under the code provisions, the beneficiary takes no estate, *the creation of the trust may vest an estate in the trustee, and still leave an estate in the trustor.* Under an instrument like the one in question, *the trustee takes a fee, such estate being necessary for the carrying out of the trust to sell if the debt should not be paid. But since, upon payment of the debt, the property will revest in the trustor* or his successors, *an interest in the property is left in such trustor. Such interest is an estate, and, as it may pass by devise or descent, is an estate of inheritance.* 'The legal title is conveyed solely for the purpose of security, leaving in the trustor or his successor a legal estate in the property, as against all persons except the trustees and those lawfully claiming under them.' (*MacLeod* v. *Moran, ante,* p. 97; 94 Pac., 604.)"

9. Section 1192 of the Code of Civil Procedure of California provides that a lien for the cost of a building can be enforced against the land and the interests therein unless the person "claiming an interest" in such land gives notice that he will not be liable for such cost. In a case where the trustee under a deed of trust had not given such a notice it was to his advantage, of course, to claim that he had no "interest," but

a mere encumbrance, upon the land. His claim was allowed, in the case of

Hollywood Lumber Co. v. *Love,* 155 Cal., 270, 271-273; 100 Pac., 698, 699.

The Court carefully restricts the language used in *Weber* v. *McCleverty* (*No. 5 supra*), in criticism of the earlier case of *Williams* v. *Santa Clara Min. Ass.* and suggesting that a deed of trust creates an estate and not a lien. It adds:

> "There is good reason for treating a trust deed as an encumbrance for the purpose of this discussion. . . . The legal title is conveyed solely for the purpose of security, leaving in the trustor or his successors a legal estate in the property, as against all persons except the trustees and those lawfully claiming under them. (Civ. Code, Secs. 865, 866.) *Except as to the trustees* and those holding under them, *the trustor* or his successor *is treated by our law as the holder of the legal title.* (*King* v. *Gotz,* 70 Cal., 236; 11 Pac., 656.)"

10. Late decisions dealing with cases where the estate of the trustee is alone involved, and where the Court makes it clear that *his* title is only one

> "for the purposes of the trust."

Travelli v. *Bowman,* 150 Cal., 587, 590; 89 Pac., 347;

Sacramento Bank v. *Murphy,* 158 id., 390, 395; 115 id. 232.

From the above quotations this Court can judge how meritorious is the argument of the appellant that under the laws of California Campbell & Kent, the trustees under the deed of trust executed by George Staacke in 1892 (Brief, p. 57)

> "took, received and held the absolute and whole title in fee free from every title, right or claim, legal or equitable, of John S. Bell and Thomas Bell. Nothing was then left in either John S. Bell or Thomas Bell, and nothing could have been left in Staacke."

Neither the code section, nor the cases, cited (Brief, pp. 53-56), support the proposition that the conveyance to Campbell & Kent left no estate or title in Staacke. They do not even touch upon the question.

The contention of the appellant, then, falls at the outset. The trustor, Staacke, had a substantial legal estate upon which the judgment in *Bell* v. *Staacke* could and did operate.

The decisions above cited dispose effectively of the appellant's bold statement (Brief, p. 72) that:

> "In California, *a deed of trust has no feature in common with a mortgage* except that it is executed to secure an indebtedness and a suit for a foreclosure and sale will not lie, as the contract of the parties is that, upon default, the trustee shall sell according to the directions of the trust deed." (Italics ours.)

Certainly the authorities cited by counsel for appellant do not support his dictum. There *is* language

in the early cases that justifies the assertion that the "legal title" is in the trustee. But in view, not only of the code sections permitting the trustor to convey *his* estate, but of the later decisions describing the breadth of that estate and of the legal title of the trustor, as well as limiting the estate and title of the trustee to its proper functions, it would seem that the inconsistent expressions antedating *Sacramento Bank* v. *Alcorn,* if they cannot be reconciled with that case and its successors, are overruled.

With the unnecessary proposition advanced on page 57 of the appellant's brief, that *the beneficiary* of a trust takes no estate or interest in the property, we have no particular quarrel here, though it could doubtless be questioned if that were necessary. The appellant, however, does not and cannot cite any authority for the proposition it has actually raised, that *a trustor,* who creates a trust for the single restricted purpose of giving security, thereby loses all estate and interest in the property which is the subject of the trust.

D.

The So-called Fraud in Making Payment to San Francisco Savings Union Without Sale of the 10,000-acre Tract.

The bill contains lengthy charges of fraud against Teresa Bell, as administratrix, etc., and Mercantile Trust Company of San Francisco, as trustee for San Francisco Savings Union, in that the former, on or

about June 16, 1908, paid to the latter over $179,000 in satisfaction of the judgment recovered by the latter, being the judgment for the original $60,000 borrowed by George Staacke in 1892, together with 16 years' interest on such sum, taxes, costs and attorneys' fees (Tr., pp. 81-92). These charges are discussed in the brief (pp. 76-84), and we shall touch upon them in passing.

The actual circumstances surrounding such payment become evident upon an examination of the various judgments and a comparison of their several dates. They were these: In January, 1906, the Supreme Court dismissed the appeal from the second judgment in *Bell* v. *Staacke*. In February, 1906, an order of sale on such judgment was issued out of the Superior Court of Santa Barbara. In March, 1906, the commissioner sold the 10,000-acre tract, under such judgment and order, to Teresa Bell, as administratrix, etc. In April, 1907, he executed a deed to the said purchaser. In July, 1907, the order denying the motion for a new trial of *Bell* v. *Staacke* was affirmed by the Supreme Court. Thereafter the right and title of Teresa Bell, as administratrix, etc., to the 10,000-acre tract was, as between herself and John S. Bell and his grantees, unquestioned (Tr., pp. 249-250). The latter thereafter had no interest in the 10,000-acre tract, consequently no interest in how or when the lien of the San Francisco Savings Union judgment on that tract was foreclosed or discharged.

When, in February, 1908, the judgment in *San*

Francisco Savings Union case was affrmed, which decreed a sale, first, of the 10,000-acre tract, second, of the 4,000-acre tract, to satisfy the amount of $158,-000, plus interest since accrued, costs, etc., the necessity for having a sale had passed. Teresa Bell, as administratrix, etc., had by this time acquired, under the judgment in *Bell* v. *Staacke,* all the right of "George Staacke, his heirs and assigns" in the 10,000-acre tract. She also held for the estate the Thomas Bell tract of 4,000 acres. *Both the tracts now belonged to the Thomas Bell estate.* To permit a sale of the property would be an idle thing, that could result in nothing but increased cost to the estate, the only person interested in clearing both tracts, or either tract, from the burden of the bank's judgment. *It was* not only proper, but *the most evident duty, of the administratrix to pay the judgment. Otherwise she might have lost to the estate* not only the 10,000-acre tract, for which it had paid some $95,000, not to mention interest lost, but *the 4,000-acre tract,* which it had always owned *as well.* For no redemption exists after a sale under a deed of trust. So *she paid the judgment, under order of the probate Court* (Tr., p. 252). In return she received the reconveyance which at length cleared the title to the properties (Tr., pp. 252-253). There only remained the step of obtaining possession of the last portion of the 10,000-acre tract held by the appellant's predecessors, which was done by a writ of assistance and the affirmance

by the Supreme Court of its issuance (Tr., pp. 250-251).

The contention of the appellant, that it had a right to have a sale made of the 10,000-acre tract under the San Francisco Savings Union judgment, falls (1) because the only trust upon which the trustee held the property was to apply the proceeds on sale to the satisfaction of the judgment, and to pay the balance, if any, to "George Staacke, his heirs or assigns," (2) because the estate of Thomas Bell had, under decrees of Court, been established in the position of "George Staacke, his heirs or assigns," (3) because the sale being directed for the sole purpose of satisfying the judgment, it was eminently proper for the only person interested in not having a sale to pay, under order of the probate Court, the judgment without a sale, and for the trustee, whose only care was to see the judgment paid, to accept such payment in satisfaction.

IV.

THE EQUITY OF THE BILL.

It may not be amiss to point out, in connection with the insufficiency of the bill on the merits, its insufficiency as a pleading in this Court. Its inequity is apparent. The appellant endeavored to obtain by its pleading the benefit of the vacated judgment in *Bell* v. *Staacke* by a bald-faced and intentional sup-

pression of the fact that six subsequent judgments, in the trial and appellate courts, vacated that decree and directed results wholly different.

A further feature of the bill condemns it utterly. It admits, and *Bell* v. *Staacke* proves, a debt of $95,000 due from the complainant's predecessors to the estate of Thomas Bell. It *accuses* that estate of a payment of $179,000 in discharge of the lien, on the 10,000-acre tract, of a judgment whose finality it asserts. Yet *the bill,* though it demands the quieting of title to all the 10,000-acre tract, conveyances thereto, and the broadest relief, *makes no pretense to a tender of any part of either of these substantial sums,* increased as they now are by the interest of years! Needless to say, we mention this defect in the bill simply to indicate the character of that pleading. The appellant, we maintain, of course, has no rights to plead. But even if it did possess such rights, and had otherwise pleaded them properly, its failure to offer equity could not but lead to a refusal of its prayer for equity.

Tripp v. *Duane,* 13 Pac., 860.

Further, the present appellees, Hammon and van Deinse, are not parties to the old litigation. Their rights have been acquired since the judgments in *Bell* v. *Staacke* and *Bell* v. *San Francisco Savings Union.* They are in the position to say to the appellant, as did the Court in the case of

Di Nola v. *Allison,* 143 Cal., 106, 110; 76 Pac., 976, 977:

> "A defendant who permits a final judgment against him to remain of record without questioning its validity can invoke no equity in his favor for disputing the title of one who has purchased his property in reliance upon the correctness of that judgment. (See *Hunt* v. *Loucks,* 38 Cal., 382; *Rector* v. *Fitzgerald,* 59 Fed., 808.)"

At the hearing in the Court below the existence of all the judgments, orders and decrees pleaded in the answer was admitted by the appellant's counsel. While we are touching on the failure of the bill to state an equitable cause of action, and lest it should escape the Court's notice, we call the Court's attention to the *two judgments of dismissal secured by the appellant* on two several occasions, in 1910 and 1911, respectively, immediately before the trial of actions in the Superior Court of Santa Barbara brought by the appellant itself and involving the same issues sought to be raised in the present bill (Tr., pp. 253-255).

We also point to the fact that in all the litigation in *Bell* v. *Staacke,* save the appeal from the order granting a writ of assistance, the present solicitors of appellant were the attorneys for the appellant and its predecessors. The theories they now advance have been held and advanced by them for twenty years. Those theories, as well as the appellant, have had their day in Court.

We respectfully submit to this Court, as to the District Court, that when *all* the orders and decisions of the State Courts are considered it becomes evident that there is no equity in the bill.

V.

CONCLUSION. A WORD ON RES ADJUDICATA.

Perhaps it would have been more logical *to commence* with a discussion of the principles applicable to this case and the present defense. But the facts and chronology of the litigation called for first attention. With the whole story of *Bell* v. *Staacke* and *Bell* v. *San Francisco Savings Union* before the Court it seems to us incontestible that the judgments pleaded are an absolute bar to any recovery under this bill, and that there was no error in the decree of the District Court so holding.

The gist of the bill is a collateral attack upon the final judgment on retrial in *Bell* v. *Staacke*. According to appellant this judgment, affirmed though it was itself, and as was the sale made under it as well, by the State Supreme Court was a "pretended" judgment (Brief, pp. 5, 33, 56, 60, 62, 66), a "purported" judgment (Brief, pp. 62, 63, 64), which was "void for want of jurisdiction" (Brief, pp. 5, 42), and "absolutely null and void" (Brief, p. 25).

The Supreme Court of the United States, by Mr. Justice Brewer, has answered similar suggestions by saying:

"The defendants by the proceedings which they initiated in the land office compelled the plaintiffs to institute a suit in a court of competent jurisdiction to enforce their rights. After such suit has been commenced and the defendants have been made parties thereto, and the Court has proceeded to judgment, *will the defendants be heard to say that that judgment amounts to nothing? We are clearly of the opinion that this cannot be tolerated,* that the judgment was in all respects regular, that it was conclusive as to the particular ground in controversy, and binding by way of estoppel as to every fact necessarily determined by it." (Italics ours.)

Last Chance Min. Co. v. *Tyler Min. Co.,* 157 U. S., 683, 695.

We also respectfully cite the Court to a recent decision of the Supreme Court of California in discouragement of attacks, collateral or otherwise, upon valid judgments.

Lake v. *Superior Court,* 165 Cal., 182.

The principles governing Courts in their application of the doctrine of *res adjudicata* as a bar to stale and litigated demands are too well known to require elaborate discussion.

Suffice it to point out that upon a plea or answer of *res adjudicata* the Court will look at *the opinions* of the Court whose judgment is urged in defense, and, if necessary, also at *the pleadings* in the earlier cause.

Nat'l F'dry, etc. v. *Oconto W. S. Co.,* 183 U. S., 216, 234;
McIntosh v. *Pittsburg,* 112 Fed., 705;
W. S. v. *Norfolk & W. Ry. Co.,* 114 id., 683.

An attempt was made by Southern Pacific Railroad Company in a collateral proceeding to renew a contest, settled by judgment years before, as to the sufficiency of certain maps. Mr. Justice Harlan said in this case, in which he reviews the authorities on *res adjudicata,*

Southern Pacific Railroad v. *U. S.,* 168 U. S., 1, 48-49:

"Is this position consistent with the settled rule of law as to the conclusiveness, between parties and their privies, of the final determination by a court of competent jurisdiction of matters put in issue by the pleadings?

"The importance of this question, independently of the magnitude of the interests to be affected by our decision, and of the earnest contention of learned counsel, justifies a reference to some of the adjudged cases, showing the grounds upon which this salutary rule rests.

"The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken

> as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

The decision in *Baker* v. *Cummings,* 181 U. S., 117, 124, 130, is to the same effect.

In the words of Judge Buffington, in the case of *McIntosh* v. *Pittsburgh,* above cited (112 Fed., 709):

> "It would be a perversion of the rights of non-residents and of the jurisdiction, and power of federal courts, if, under the claim of nonresidence, this property owner could again draw in question an issue which has, as against her, been already settled by the courts of the state. There is a time when litigation should close, and, the question here involved having been passed on by the state court, the refusal of the federal to relitigate the issue is in accord with the spirit of that wholesome maxim, *'Interest reipublicae ut sit finis litium.'*"

We submit the following propositions to be correct and to support, individually as well as collectively, the decree of the District Court here appealed from:

1. That decree properly and finally recites the terms of the stipulation entered into by counsel, before the District Court, prior to the hearing on the special defenses.

2. The judgment of *June 29, 1901,* in *Bell* v. *Staacke,* upon which appellant founds its right, was *vacated November 30, 1903* (*Bell* v. *Staacke,* 141 Cal., 203; 74 Pac., 780).

3. The judgment of *October 17, 1904,* on retrial of *Bell* v. *Staacke,* was affirmed *July 22, 1907* (*Bell* v. *Staacke,* 151 Cal., 544; 91 Pac., 322). The appellees' title and possession, acquired under it and confirmed by the State Courts, will not be questioned by this Court.

4. The judgment in the *San Francisco Savings Union case* does not in the slightest degree affect the litigation in *Bell* v. *Staacke,* because, first, the issues in the *San Francisco Savings Union case* were narrower than in *Bell* v. *Staacke,* and were raised in a different connection and between different parties; second, the reservation of issues and matters then pending in *Bell* v. *Staacke,* made in the judgment in *San Francisco Savings Union case,* is express and explicit; third, the two judgments are not in conflict, either in terms or effect. The same trial judge tried both cases and drew the line between their different scopes of operation. His distinction was upheld by

the Supreme Court (*Bell* v. *San Francisco Savings Union,* 153 Cal., 64; 94 Pac., 225).

5. The judgment in *Bell* v. *Staacke* had, in spite of the existence of the trust deed, an estate upon which it could effectively operate, that is, *the substantial legal estate* reserved and preserved by the laws and decisions of California to the trustor whose conveyance in trust, for the purpose of security, vests in the trustee only such estate as is absolutely essential for the *limited purposes* of such trust.

6. The appellant could not recover on its bill, and the defense of *res adjudicata* is here absolute, because:

(a) The bill pleads no right in appellant save one based upon a theory that the State Courts have repeatedly erred in a construction of a State statute of procedure;

(b) The judgments pleaded by the appellees, and the opinions of Court supporting them, show that a long litigation in the State Courts has finally resolved in favor of the appellees the very questions the appellant now seeks to renew in a Federal tribunal; and

(c) The bill, by its patent subterfuges of evasion and suppression, while purporting to plead the *Bell* v. *Staacke* litigation, and by its prayer for relief without tender of the amounts of the two judgments paid by the appellees, fails to state such a cause of action as is entertainable by a court of equity.

For these reasons, and for the other reasons stated in the foregoing brief, we respectfully submit that the decree appealed from should be affirmed.

CHARLES W. SLACK and
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Solicitors for said Appellees W. P. Hammon
and F. C. van Deinse.